

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH B. GEIST)	
Claimant)	
VS.)	
)	Docket No. 119,415
DODSON AVIATION, INC.)	
Respondent)	
AND)	
)	
OAK RIVER INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appealed the July 19, 2001 Award entered by Administrative Law Judge Julie A. N. Sample.

APPEARANCES

Derek R. Chappell of Ottawa, Kansas, appeared for claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a post-award request for additional medical benefits and attorney fees. The parties agree that claimant injured his right knee on February 21, 1986, while working for respondent. In 1987, claimant underwent right knee surgery to reconstruct the anterior cruciate ligament (ACL) and was advised that additional surgery might be required. The parties settled the claim in May 1988 with claimant reserving his rights to seek additional medical treatment and review and modification of the agreed award.

Claimant contends his symptoms never completely resolved, and in either August or September 2000, while playing golf, claimant experienced increased pain and bruising

around his right knee. When the bruising did not subside, claimant sought medical treatment and learned that his ACL graft was torn and needed surgical repair. Claimant requested authorized medical benefits from respondent and its insurance carrier but they refused, prompting claimant to initiate this post-award request for medical treatment.

After conducting a hearing and reviewing the medical testimony presented, Judge Sample entered the July 19, 2001 Award in which she granted claimant's request for additional medical benefits and awarded claimant \$4,378 in attorney fees. The Judge specifically found claimant attorney's time records were consistent, logical and reasonable.

Respondent and its insurance carrier contend Judge Sample erred. They argue claimant's torn ACL graft is a new condition caused by either the intervening golfing incident or claimant's intervening work activities. They argue the Judge misinterpreted the testimonies of all three doctors who testified – Dr. Jon E. Browne, Dr. Steven L. Hendler, and Dr. Chris D. Fevurly. Respondent and its insurance carrier also argue claimant lacks good faith in pursuing this request for additional medical treatment and, therefore, the request for attorney fees should be denied. Finally, they argue the request for attorney fees is excessive and, in part, unsubstantiated. In the alternative, they request that any fee awarded claimant be substantially reduced as they question the time allegedly expended by claimant's attorney in this matter.

Conversely, claimant requests the Board to affirm the July 19, 2001 Award. Claimant argues that he continued to have pain and instability in the right knee following the 1987 surgery and following the parties' 1988 settlement. Claimant contends he has proven his ACL graft has worn out and now needs to be surgically repaired.

The only issues before the Board on this appeal are:

1. Is claimant's present need for medical treatment to the right knee the natural and probable consequence of the February 1986 work-related injury or the result of a new and independent trauma?
2. Is claimant entitled an award for post-award attorney fees and, if so, how much?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On February 21, 1986, claimant injured his right knee while working for respondent. Claimant tore the anterior cruciate ligament (ACL) and partially tore the lateral meniscus.
2. In February 1987, claimant began treating with Dr. Jon E. Browne, a board certified orthopedic surgeon who specializes in knee injuries. In 1987, Dr. Browne operated on claimant's right knee and removed torn cartilage and reconstructed the ACL with two

hamstring grafts, which were intertwined and then secured inside the knee with screws and washers.

3. In May 1988, Dr. Browne released claimant from treatment. Although claimant still had some laxity in his knee, the doctor advised claimant that he could resume full-time unrestricted work and engage in sports such as snow skiing and water skiing. In 1988, Dr. Browne rated claimant's right lower extremity functional impairment at 25 percent. Moreover, at the time of the medical release, Dr. Browne and claimant discussed the ongoing instability in the knee and the possibility of additional reconstructive surgery. But when claimant was released, the doctor did not believe the instability was disabling enough to justify additional surgery at that time. The doctor recommended that claimant use his Lenox-Hill knee brace, as needed, on a day-to-day basis and certainly while working. Claimant wore his knee brace until it wore out.¹

4. Claimant testified that he continually experienced instability and pain in his knee following surgery and following Dr. Browne's release in May 1988. Despite having those symptoms, other than a one-time visit to Ottawa Family Physicians in February 2000, claimant did not seek additional medical treatment for his knee until September 2000, approximately two or three weeks following an incident of increased pain while playing golf. In either late August or early September 2000, claimant was playing golf and felt a tearing or pulling sensation in the back of his right leg around the knee joint while he was chipping onto a golf green. On September 11, 2000, claimant saw Dr. Gollier of Ottawa, Kansas, who diagnosed a pulled hamstring.

5. On December 1, 2000, claimant returned to Dr. Browne for their first visit since May 1988. At that visit, claimant was complaining of pain, catching, and a feeling of instability about his right knee. According to Dr. Browne, claimant advised the doctor that his knee had been gradually becoming more and more unstable due to the type of work that he had been doing. After examining claimant and performing various tests, the doctor determined that claimant's ACL graft was torn and, therefore, needed surgical repair. The doctor also determined that claimant had a lateral meniscus tear that was caused by the joint laxity that had developed over the past several years.

6. At his deposition, Dr. Browne reviewed Dr. Gollier's notes from the September 11, 2000 visit, and stated that those notes indicate claimant injured his hamstring in the golfing incident as there is no mention that claimant had disrupted his ACL graft or that he had torn his lateral meniscus. The doctor testified, in part:

Well, going by Dr. Gollier's statement, he assesses this [golfing incident] as a hamstring injury. There's no statement made in here about whether or not

¹ According to Dr. Chris D. Fevurly's May 2001 medical report, claimant's brace wore out in approximately 1994 or 1995.

his [claimant's] ACL graft has been disrupted or he's torn his lateral meniscus. It's just not there.

If he injured himself when he's golfing, it certainly sounds to me like he had a hamstring tear; I mean, from his golfing injury. This is what it sounds like. There's no mention in here whatsoever about tearing his ACL graft or lateral meniscus whatever.²

Moreover, Dr. Browne testified that patients who have an acute tear to a functioning ACL graft usually have a distinct pop or catch, marked diffusion of the knee, and most of the time they will not be walking around for several days but, instead, they will be seeking immediate medical attention.

7. Although Dr. Browne ruled out the golfing incident as the cause of claimant's torn ACL graft, the doctor indicated that it was claimant's years of work as a self-employed carpenter that is the most likely cause of the gradual deterioration in claimant's knee. The doctor testified, as follows:

Well, his findings and examination for someone who's done carpentry work for a number of years since ACL reconstruction certainly would be a significant, I think, contributor to making his knee what it is for that examination.³

. . .

Well, I think that by nature, that type of employment, carpentry work, where you're kneeling, squatting, bending, ladders, et cetera, puts a great deal of stress on the joint. There's always a risk that over a period of years that the surgery you might have performed will eventually fail, or at least become weaker.⁴

. . .

Well, I think that the best information that I have is I've not seen him, and if I've not seen him and he's had no other new injury, then the only conclusions I can come to is that the type of employment that he's performing and doing,

² Deposition of Dr. Jon E. Browne, May 1, 2001; p. 21.

³ Deposition of Dr. Browne; p. 24.

⁴ Deposition of Dr. Browne; p. 25.

that that's the most likely culprit for causing gradual deterioration of his knee functional status.⁵

. . .

I think that it's more than likely, unless he's had other medical care or treatment, that the type of employment he's been involved with is . . . most likely the problem with his knee gradual deterioration of function.⁶

. . .

I think whatever I found there was a reflection of the type of employment work he'd been doing over a period of years.⁷

Attributing the torn ACL graft to the work that claimant had performed over a period of years, the doctor concluded that claimant's ACL graft tear was not acute. In reaching that conclusion, the doctor considered an MRI scan, which tended to rule out a recent injury to the knee because there was no bruising in the bone surfaces inside the knee or other findings to suggest an acute injury.

8. Respondent and its insurance carrier hired Dr. Chris D. Fevurly, a Lawrence, Kansas occupational medicine doctor, to examine and evaluate claimant. The doctor saw claimant in May 2001 and diagnosed an acute rupture of the right knee ACL graft and an acute tear of the lateral meniscus, which the doctor believed were caused by the August or September 2000 golfing incident. Dr. Fevurly agrees with Dr. Browne that claimant now needs a repeat reconstruction of the right knee ACL and a lateral meniscectomy.

9. Respondent and its insurance carrier also hired Dr. Steven L. Hendler, a Shawnee Mission, Kansas physiatrist, to examine and evaluate claimant. The doctor saw claimant in May 2001 and determined that claimant's present knee problems are not the natural and probable result of the February 1986 accident and resulting surgery but, instead, the result of the August or September 2000 golfing incident.

CONCLUSIONS OF LAW

1. The award of additional medical benefits should be reversed.

⁵ Deposition of Dr. Browne; p. 28.

⁶ Deposition of Dr. Browne; p. 29.

⁷ Deposition of Dr. Browne; p. 31.

2. Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,⁸ the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

3. But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*,⁹ the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

4. Claimant argues the torn ACL graft is the direct and natural result of the February 1986 work-related accident and resulting medical treatment. The Board disagrees. By the questions asked of the medical experts, claimant appears to argue that the torn graft would not exist today if there had not been a graft in the first instance. Of course that statement is true, but that logic and analysis is not determinative. Instead, the proper question is whether claimant's present need for medical treatment is directly and naturally related to the February 1986 accident. In *Nance*,¹⁰ the Kansas Supreme Court held:

When a primary injury under the Kansas Workers Compensation Act is shown to have arisen out of and in the course of employment, **every natural consequence** that flows from the injury, including a new and distinct injury, is compensable if it is a **direct and natural result** of a primary injury. (Emphasis added.)

5. The Board finds that Dr. Browne's testimony is the most credible and, therefore, concludes that claimant developed a tear in his ACL graft over a period of time as a result of the work that he was doing as a self-employed carpenter. The Board also concludes that the ACL graft tear is neither a natural nor probable result of the February 1986 accident and resulting knee surgery. Moreover, the Board finds and concludes that it is

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁹ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

¹⁰ *Nance v. Harvey County*, 263 Kan. 542, syl. 4, 952 P.2d 411 (1997).

more probably true than not that the ACL graft and meniscal tears that now exist in claimant's right knee were caused by his work activities as a self-employed carpenter. Because claimant's present need for medical treatment is the result of a new and distinct accidental injury, the request for additional medical benefits from respondent and its insurance carrier should be denied.

6. The Board affirms the Judge's award of attorney fees to claimant's attorney. Claimant's attorney filed a statement itemizing the time expended in this post-award proceeding. Although claimant's attorney initially requested fees based on \$125 per hour, the Judge used \$110 per hour. The Board finds the award of \$4,378 in post-award attorney fees is reasonable after considering the 39.80 hours expended by claimant's attorney, the issues involved, and the reasonable and customary charges of other attorneys in workers compensation matters.

7. The Board adopts the Judge's findings, conclusions, and orders as set forth in the July 19, 2001 Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Board reverses the July 19, 2001 Award to deny claimant's request to require respondent and its insurance carrier to provide surgery for the right knee, but the Board affirms the award of \$4,378 in attorney fees.

The Board adopts the assessment of administrative costs as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of October 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Workers Compensation Director